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SUMMARY RECORD OF THE 1381st MEETING

Held at the Palais des Nations, Geneva,
on Tuesday, 1 November 1994, at 3 p.m.

Chairman: Mr. ANDO

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The meeting was called to order at 3.20 p.m.

ORGANIZATIONAL AND OTHER MATTERS (agenda item 2) (continued)

Draft general comment on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant (CCPR/C/52/CRP.1/Rev.1) (continued)

1. The CHAIRMAN invited the Committee to continue its consideration of the revised draft general comment prepared by Mrs. Higgins (CCPR/C/52/CRP.1/Rev.1).

Paragraph 10

2. Mrs. CHANET, supported by Mr. NDIAYE, suggested that paragraphs 10 and 11 should be reordered. It would be more logical to deal first with reservations which were absolutely ruled out for reasons of peremptory law and then with those incompatible with customary law.

3. Mrs. HIGGINS, accepting the suggestion, said that in that case the new paragraph 10 (existing para. 11) would require a new introductory comment, such as: "Reservations that offend peremptory norms will not be compatible with the objects and purposes of the Covenant"; new paragraph 11 (existing para. 10) would then start with a form of words such as: "Applying more generally the objects and purposes test, the Committee notes that, for example, reservation to article 1 denying peoples the right ...".

4. It was so decided.

5. Paragraphs 10 and 11, as amended, were adopted.

Paragraph 12

6. Mr. EL SHAFEI suggested that the word "classes" in the first sentence should be replaced by the word "categories".

7. It was so decided.

8. Mrs. CHANET questioned the appropriateness of the sixth sentence of the paragraph ("Articles 9 and 27, for example, are not mentioned in article 4") which seemed incongruous in a passage dealing essentially with non-derogable rights.

9. After a discussion in which Mrs. HIGGINS, Mrs. EVATT and Mrs. CHANET took part, the CHAIRMAN suggested that the sentence in question should be deleted and that the words "such as those in articles 9 and 27" should be inserted between the words "profound importance" and "have in fact" in the previous sentence.

10. It was so decided.

11. Mr. BRUNI CELLI said that, without wishing to suggest an amendment, he was not entirely happy with the reference to "rights of profound importance" in the fifth sentence, which seemed to imply that other rights were not of such importance. The derogability or otherwise of certain rights surely had nothing to do with their relative importance but, rather, with considerations of law and order at certain points in time.

12. Mrs. EVATT and Mr. LALLAH said that, in their view, the emphasis placed on the importance of certain rights was entirely justified in the context.

13. Paragraph 12, as amended, was adopted.

Paragraph 13

14. Following an observation by Mr. WENNERGREN, Mrs. HIGGINS suggested that the words "also designed to secure" in the eighth sentence of the paragraph should be replaced by the words "directed to securing".

15. It was so decided.

16. Mrs. CHANET, after commenting on the general excellence of the paragraph, said that the word "doctrine" at the end of the tenth sentence of the French text was incorrect and should be replaced by the word "jurisprudence".

17. It was so decided.

18. Mr. BRUNI CELLI said that the word "requisitos" made the last sentence of the Spanish text unintelligible, and wondered whether the reference to the "requirements of any provisions of the Covenant" was not redundant in the other languages as well. Would it not be sufficient to speak of "the provisions of the Covenant"?

19. Mrs. HIGGINS explained that her intention had been to distinguish between what the Covenant actually said and what the Committee thought it required from States parties. Some countries, while accepting a particular article of the Covenant, made a reservation to the interpretation placed on that article by the Committee.

20. The CHAIRMAN said that an appropriate correction would be made to the Spanish text of the paragraph.

21. Paragraph 13, as amended, was adopted.

Paragraph 14

22. Mrs. CHANET drew attention to an apparent typographical error and suggested a number of changes to the phrasing and syntax of the final sentence in the French version.

23. Mrs. EVATT agreed with the substance of the paragraph but thought that the phrase "No real international rights" in the penultimate sentence should

be changed to "No real international obligations or rights". She also proposed a number of amendments to the syntax of the final sentence in the interests of clarity.

24. Mrs. HIGGINS accepted the proposed amendments, and said that the paragraph would remain unchanged up to "Covenant obligations", after which it would read: "No real international rights or obligations have thus been accepted. And when there is an absence of provisions to ensure that Covenant rights may be sued on in domestic courts, and, further, a failure to allow individual complaints to be brought to the Committee under the First Optional Protocol, all the essential elements of the Covenant guarantees have been removed.".

25. Paragraph 14, as amended was adopted.

Paragraph 15

26. Mrs. HIGGINS, introducing a number of proposed drafting changes, said that Mr. Wennergren had suggested the addition of the phrase "under the First Optional Protocol" at the end of the sentence beginning "A reservation cannot be made"; and the addition at the end of the penultimate sentence of the words "in an individual case".

27. Mr. WENNERGREN said that his main concern had been that reservations should operate only in regard to individual cases under the Optional Protocol and not restrict the competence of the Committee under article 40 of the Covenant to monitor implementation in general terms.

28. He also wished to propose the deletion of the final sentence, which appeared redundant, given that the reservations in question were made under the Optional Protocol and could not limit the Committee's monitoring function under the terms of the Covenant.

29. Mrs. CHANET drew attention to a number of minor drafting changes which were needed in the French version of the text.

30. Paragraph 15, as amended, was adopted.

Paragraph 16

31. Mr. NDIAYE, referring to the French version of the text, remarked that phrases such as "In the view of the Committee" and "The Committee has insisted upon its competence" weakened the statements concerned, which referred to objective facts under international law.

32. With regard to the final sentence, he said that he did not fully understand the distinction between "droit" and "domaine", and wondered whether the equivalents used in the English text had connotations which the French words did not have.

33. Mrs. CHANET said that the text did not take account of observations made by Mr. Pocar concerning a reservation by Chile which appeared to go further than a mere "statement consistent with its normal competence ratione temporis"

in denying not only the competence of the Committee to consider acts or events which had taken place after the entry into force of the Optional Protocol, but also the Committee's power to consider acts or events which had begun after that date. The paragraph should be amended to reflect the possibility that a statement might, as in the case of Chile, have such force.

34. In the penultimate sentence, with regard to cases which had already been examined by other international bodies, it was important in her view, in the light of the Committee's own recent experience with a particular communication, to make it clear that precluding examination of a case by the Committee was not possible where the previous examination by the other body had focused exclusively on issues of procedure and admissibility.

35. Mrs. EVATT suggested that the second sentence should be changed to "The Committee must control its own procedures".

36. With regard to the point made by Mr. Ndiaye, she agreed that the references to the Committee's subjective views should be removed.

37. Turning to the point made by Mrs. Chanet, she conceded that the paragraph might include a reference to the type of reservation which could limit the Committee's competence to the consideration of events occurring after a specific date, but was not in any event entirely convinced that such reservations were incompatible with the objects and purposes of the Optional Protocol. That being the case, the sentence concerned might best be left out altogether.

38. As for the exclusion of cases which had already been examined by other comparable bodies, she agreed that the paragraph should show clearly that that would only apply where the actual substance of the case in question had been examined by the other body.

39. Mrs. HIGGINS, following up the point made by Mr. Ndiaye, said that she felt obliged to retain the references to the Committee's views, since several members had requested that wording.

40. With regard to the legal distinction between "legal right" and "subject matter" to which Mr. Ndiaye had referred, she pointed out that the terms of article 5 (2) (b) of the First Optional Protocol were such that both concepts needed to be included.

41. In the matter of the exclusion of cases already examined elsewhere, she recalled that the Committee had declined to examine cases rejected by other bodies on grounds of admissibility. She suggested that the existing wording of the text left the Committee sufficient discretion to decide, in the light of its own jurisprudence, whether or not a case rejected by another body could still be examined by the Committee.

42. With regard to the point raised by Mrs. Chanet concerning the reservation by Chile, she agreed that the reservation had not been clearly drafted and presented problems of interpretation with regard to the Committee's competence, although in her view there was nothing in it which was inherently contrary to the objects and purposes of the Optional Protocol.

43. Mr. WENNERGREN said that it made little sense to allow States parties to make statements denying the competence of the Committee to examine acts such as disappearances which had taken place before the Optional Protocol had come into force for them but had had continuing effects after that date. Such a statement would effectively have the force of a reservation. A clear distinction needed to be made between statements and reservations, and a decision taken as to whether and to what degree statements of the kind referred to in the present text could be binding.

44. Mrs. HIGGINS suggested that the present wording of the text made it abundantly clear that the Committee remained competent to consider acts perpetrated before the entry into force of the First Optional Protocol when such acts had continuing effects on the rights of victims. She was not aware of any declaration, including that of Chile, which limited the Committee's competence in the way described by Mrs. Chanet.

45. Mrs. CHANET said that the declaration made by Chile was in fact a reservation of the type referred to by Mr. Wennergren. Despite being termed a declaration, its intent was in fact to preclude the Committee from considering the immediate or continuing effects of events which had occurred prior to 11 March 1990.

46. Mrs. HIGGINS said she was not convinced that the Chilean declaration was any more than a statement consistent with the Committee's normal competence ratione temporis. Moreover, the Committee's stance in its jurisprudence had always been that it was competent to consider continuing acts and effects. In any event, irrespective of whether such a reservation had already been made or might be made in the future, it would be imprudent of the Committee to invite States to enter such reservations by referring to them explicitly in the paragraph.

47. The CHAIRMAN endorsed that last point.

48. Mrs. CHANET said that some indication should be given of the existence of genuine reservations and to that end proposed that the words "most usually" should be inserted after the words "reservation but" in the fourth sentence. That would make it clear that the following sentence would apply in the case of ordinary statements but not in the case of one that was in fact a reservation.

49. That proposal was adopted.

50. Paragraph 16, as amended, was adopted.

Paragraph 17

51. Paragraph 17 was adopted, subject to two editorial amendments.

Paragraph 18

52. Mrs. CHANET said that, while she accepted that the content of articles 20 and 21 of the 1969 Vienna Convention on the Law of Treaties had been accurately set out in the paragraph, she did not consider those articles to be

a true reflection of the codification of customary law in the matter. Furthermore, the words "most relevant" in the third sentence had not been acceptably rendered in the French text; she asked for the French version to be aligned with the English wording.

53. Mrs. HIGGINS said that it was pertinent to make some reference to articles 20 and 21 of the Vienna Convention since although at the time of their drafting they might not have reflected customary international law they were generally regarded now as having passed into and as forming current customary law.

54. Mrs. EVATT said that, while she was perfectly in agreement with the substance of the last sentence, it could perhaps be expressed in a more understandable manner. Alternatively, a further explanatory sentence might be added to indicate that neither the reserving nor the objecting State was bound by the provisions in respect of each other, a result that did not promote the aims of the Covenant.

55. Mrs. HIGGINS said that the main reason why the concept appeared difficult was that it was meaningless in the context of human rights treaties. She doubted the value of adding another sentence that would merely repeat what had been said in the sixth sentence, although drafted differently, but would accept the addition of a comment to the effect that such a situation did little to promote the purposes of the Covenant.

56. Mr. AGUILAR URBINA said he found the last sentence perfectly logical and an accurate reflection of the situation in treaty law. However, the last part of the sentence in its Spanish version was somewhat ambiguous in its reference to the relationship between the reserving and the objecting State and should be amended to make clear that such reservations did not operate for an objecting State.

57. Paragraph 18, as amended, was adopted.

Paragraph 19

58. Mrs. HIGGINS said that Mr. Ndiaye, who had been unavoidably called away from the meeting, had asked her to present his comments on the paragraph. Firstly, he had felt that the fifth sentence did not give sufficient importance to reservations to declarations on the Committee's competence under article 41. In her view, however, it was a fact that the traditional rules on reservations did not work for human rights treaties, although reservations under article 41 might become more important in the future; it was therefore not possible to frame the sentence in any other way.

59. Secondly, Mr. Ndiaye had questioned the applicability of the word "sporadic" in the eighth sentence. The word had been deliberately used to indicate that States sometimes took the trouble to make objections and sometimes did not. They occasionally made it known that they did not like a particular provision without going so far as to raise a formal objection.

60. Thirdly, Mr. Ndiaye had asked whether the wording of the eleventh sentence could be somewhat softened. However, since that sentence was merely

a statement of fact, and further proof that the whole classical system of reservations did not work in the human rights field, it was difficult to see any way of redrafting it.

61. Mr. AGUILAR URBINA said that, although he was in principle in agreement with the sixth sentence, it should be remembered that the States making objections to reservations were those which made a point of scrutinizing the implementation of the Covenant. The majority of States parties, and particularly those in the third world, did not put forward objections, not because they felt they were inappropriate but because they did not attach any importance to objections since they did not realize the consequences of failing to make them.

62. Mrs. CHANET said that paragraph 19 was the part of the text with which she had most difficulty. It contained a long and complicated explanation of why objections to reservations were infrequent, which was not the usual procedure in general comments made by the Committee. Although she had no quarrel with an innovative approach provided that it was useful, that did not appear to be the case in the present instance. The difficulties associated with objections to reservations in the human rights field were well known to States. The Committee had no solution to offer to the problem. It would therefore be preferable to have a much shorter text which merely drew attention to two essential issues: (a) objections did not resolve the problem of reservations in international human rights law; and (b) States which made objections must realize that they would have very little effect. That would make the situation clear without labouring the point.

63. Mr. FRANCIS said the paragraph ought to be retained as it stood since it set out clearly the need for the Committee to take a leading role with regard to reservations made by States to human rights treaties. Even if all States parties made objections to a reservation, the Committee would still have to be the principal actor in monitoring the performance of States.

64. In the second sentence, he proposed that the words "not appropriate" should be replaced by "inappropriate", to take account of an earlier point made by Mr. Prado Vallejo. Consequent to that amendment, the word "inappropriate" in the sixth sentence should be replaced by "inadequate".

65. Mr. WENNERGREN, referring to the final sentence of the paragraph, said the word "compatibility" should be replaced by "acceptability", which was the term used elsewhere in the document in relation to reservations to the Covenant. The meaning of the penultimate sentence ("In the view of the Committee, because of the special characteristics of the Covenant as a human rights treaty, it is questionable whether objections by States operate not only to indicate a deep disquiet with a reservation but also have other legal consequences inter se") was not immediately clear. As he understood it, however, it directly contradicted article 21 (2) of the Vienna Convention on the Law of Treaties, which stated that a reservation did not modify the provisions of a treaty for the other parties to the treaty inter se. Inter se meant between all the parties to a treaty - but an objection by one State to another's reservation was a matter that concerned only those two States. Furthermore, "deep disquiet" was not a "legal consequence" - that phrase

should be modified or deleted. Finally, the phrase "it is questionable whether", especially in its juxtaposition with "In the view of the Committee", was much too weak and should be deleted.

66. Mrs. HIGGINS said the main points she was seeking to make in paragraph 19 were: that the traditional approach to reservations was not appropriate in the application of the Covenant, because that instrument did much more than codify exchanges of rights between specific States; and that, in practice, reservations were often made incorrectly or inadequately by States. It was important for the Committee to determine whether a large number of reservations by States reflected a specific and justified concern about a given provision, but, ultimately, it was for the Committee alone to decide whether a specific reservation was appropriate.

67. The CHAIRMAN suggested a number of amendments to streamline the text in line with the concerns expressed by Mrs. Chanet. The seventh, eighth and ninth sentences ("There is no clear pattern to such objections that have been made by States. Objections have been occasional, sporadic, made by some States but not others, on grounds not always specified, and with uncertain legal consequences. In short, the pattern is so unclear that it is not safe to assume that a non-objecting State thinks that a particular reservation is acceptable") should be deleted. The sentence reading "When an objection is made, it often does not specify a legal consequence, or sometimes even indicates that the objecting party none the less does not regard the Covenant as not in effect as between the parties concerned" should likewise be deleted.

68. Mr. BRUNI CELLI said the reference to "no clear pattern" of objections to reservations was undoubtedly intended to convey the fact that such objections were not always merely technical in nature - they could also be politically motivated. If the reasoning in the final sentence ("However, an objection to a reservation by a large number of States will provide important guidance to the Committee in its interpretation as to its compatibility") was valid, the opposite must logically be valid as well - namely, that if few or no States put forward objections, that, too, would affect the Committee's interpretation of the reservation's compatibility with the Covenant. But that was manifestly untrue. The sentence should therefore be redrafted for greater clarity.

69. Mr. AGUILAR URBINA said he disagreed with Mr. Wennergren's proposal to replace the word "compatibility" by "acceptability" in the final sentence. The reference in that sentence was to a reservation's compatibility with the Covenant, not with its acceptability from the standpoint of other States. He endorsed Mr. Bruni Celli's comment on the potential political motivations behind objections to reservations.

70. Mrs. CHANET said she fully concurred with the deletions proposed by the Chairman.

71. Mrs. HIGGINS, responding to Mr. Bruni Celli's comments, proposed that the final sentence should be revised to read: "However, an objection to a reservation made by States will provide a certain guidance to the Committee in its interpretation as to its compatibility with the objects and purposes of the Covenant." In view of the remarks made by Mr. Wennergren on the penultimate sentence, she would delete the phrase "but also have other legal

consequences inter se". As to his suggestion that the phrase "it is questionable" should be deleted, she believed that, without it, the sentence would be too strong. If one State objected to a reservation made by another State, that could have an impact on consideration of a communication concerning that State under article 41 of the Covenant. Turning to the problems raised by Mrs. Chanet and to the Chairman's proposed deletions, she said the sentences in question were those that outlined what actual State practice was with regard to reservations. Since that practice was not always satisfactory, some reference to it must be made.

72. Mr. FRANCIS noted that paragraph 19 advanced an important argument on which the entire general comment was based. While the members of the Committee were well versed in the background to that argument, not all readers would be. He therefore believed there was merit in setting out the argumentation in full.

73. Mr. LALLAH agreed with Mr. Francis that the paragraph should not be shortened. The Committee was explaining that its views on reservations proceeded from its practical experience in the matter, and that was an important point that needed to be made. It was also important to say that reservations did not always fall into a clear pattern and were not made consistently.

74. The wording of the penultimate sentence might be improved by the replacement of the phrase "it is questionable whether ..." by "it is open to question what effect inter se objections by States may have". In order to make the final sentence less categorical, the word "will" should be replaced by "may".

75. Mr. POCAR said he favoured the deletion of the sentence reading: "There is no clear pattern to such objections that have been made by States." The eleventh sentence ("When an objection is made ...") should be placed before the ninth ("In short, the pattern is so unclear ..."), and the final phrase in the eighth sentence ("and with uncertain legal consequences") should be deleted.

76. Mrs. HIGGINS said that, in the first sentence, the words "the Law of" should be inserted between "Vienna Convention on" and "Treaties". Taking into account the various comments made, she would also suggest the following revisions to the paragraph. In the second sentence, the word "not appropriate" should be replaced by "inappropriate". In the sixth sentence, the word "inappropriate" should be replaced by "inadequate". That sentence would be followed by the following text: "The absence of protest by States cannot imply that a reservation is either compatible or incompatible with the objects and purposes of the Covenant. Objections have been occasional, sporadic, made by some States but not others, on grounds not always specified. When an objection is made, it often does not specify a legal consequence, or sometimes even indicates that the objecting party does not regard the Covenant as not in effect between the parties concerned. In short, the pattern is so unclear that it is not safe to assume that a non-objecting State thinks that a particular reservation is acceptable. In the view of the Committee, because of the special characteristics of the Covenant as a human rights treaty, it is open to question what effects reservations have between States inter se.

However, an objection to a reservation made by States may provide a certain guidance to the Committee in its interpretation as to its compatibility with the objects and purposes of the Covenant."

77. Mr. AGUILAR URBINA said that, for the purposes of translation into Spanish, the words "a certain" in the final sentence should be taken to mean "some".

78. Mr. POCAR said he would have preferred a slightly different word order, but would not oppose a consensus on the proposal by Mrs. Higgins.

79. Mrs. HIGGINS, replying to a remark made by Mrs. CHANET, said that in the eighth sentence ("Objections have been ..."), the word "sporadic" should be deleted.

80. The CHAIRMAN said he would take it that the Committee wished to adopt the new wording for the paragraph proposed by Mrs. Higgins.

81. It was so decided.

82. Paragraph 19, as amended, was adopted.

The meeting rose at 6 p.m.